Supreme Court, U.S.
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No. 93-959

In the Supreme Court of the United States

OCTOBER TERM, 1993

CLARENCE B. GERGICK, PETITIONER

v.

ROGER W. JOHNSON, ADMINISTRATOR,
GENERAL SERVICES ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Service Reform Act of 1978, as amended, precludes the petitioner from suing under the Federal Tort Claims Act for damages relating to an adverse personnel action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 943 F.2d 157.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1993. A petition for rehearing was denied on August 13, 1993. Pet. App. A1. On November 2, 1993, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including December 13, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the Section Chief for Credit and Finance in the Accounts Receivables Branch of the General Services Administration (GSA) in Kansas City, Missouri. Following a series of disputes between petitioner and his supervisors, petitioner filed two claims with the Merit Systems Protection Board (MSPB), alleging that certain employees of the GSA had retaliated against him for whistleblowing. Pet. App. B1-B2, C6. The MSPB determined that petitioner's supervisors had retaliated against him in violation of the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16. Pet. App. B2, C6-C7. The MSPB granted various forms of relief, ordering a halt to retaliation, purging petitioner's records of unfavorable documents reflecting retaliation, issuing a corrected performance rating, and awarding back pay and interest. *Id.* at B2, C7-C8.

Petitioner also filed this action against the United States and the Acting Administrator of the GSA.[1] He alleged that the GSA through its employees retaliated against him for supporting his subordinates' equal employment opportunity complaints, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a). In addition, petitioner sought relief for alleged violations of the Privacy Act of 1974, 5 U.S.C. 552a. Finally, he filed a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, claiming intentional infliction of emotional distress arising from alleged retaliation for his whistleblowing activities. Pet. App. B2-B3, C1, C5.

[1] The current Administrator, Roger W. Johnson, has been substituted in the caption of this case.

2. The district court granted the government's motion for summary judgment on petitioner's FTCA claim, reasoning that the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, provides the exclusive remedy for an alleged violation of the WPA. Pet. App. C8-C16.[2] Relying on *Premachandra* v. *United States*, 739 F.2d 392 (8th Cir. 1984), and *Rivera* v. *United States*, 924 F.2d 948 (9th Cir. 1991), the court accordingly held that the CSRA precludes petitioner's FTCA claims. Pet. App. C10-C14.[3]

3. The court of appeals affirmed. Pet. App. B1-B9. The court held that the exclusive remedies provided by the CSRA "may neither be supplemented nor replaced by other remedies." *Id.* at B7. The court also rejected petitioner's effort to pursue his FTCA claim for emotional distress "as a supplement to his retaliation claim under Title VII." *Ibid.* The court reasoned that Title VII supplies the exclusive remedy for discrimination claims by federal employees and does not authorize damages for emotional distress. *Id.* at B7-B8.

ARGUMENT

The court of appeals' decision holding that the Civil Service Reform Act of 1978 (CSRA) precludes petitioner's Federal Tort Claims Act (FTCA) claim is correct and does not conflict with any decision of this Court

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[2] The WPA encourages employees to disclose evidence of "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. 1213(a)(1)(B) (Supp. IV 1992). The WPA also amended the CSRA by adding a provision prohibiting retaliation against whistleblowers. 5 U.S.C. 2302(b)(8) (Supp. IV 1992).

[3] Following a bench trial, the district court rejected petitioner's claims under Title VII and the Privacy Act. Pet. App. B3. Those claims are not before this Court.

or of any other court of appeals. Further review is therefore unwarranted.

The CSRA "'comprehensively overhauled the civil service system,' creating an elaborate 'new framework for evaluating adverse personnel actions against [federal employees].'" *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (citation omitted) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 773, 774 (1985)). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Fausto*, 484 U.S. at 443. As this Court has recognized, "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action" with "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 444, 445.

In light of those purposes, the Court in *Fausto* held that Congress intended the remedial scheme of the CSRA to preclude other remedies previously possessed by federal employees with respect to adverse personnel actions. Specifically, the Court in *Fausto* held that the CSRA's administrative and judicial review provisions precluded a federal employee from seeking judicial review of an adverse personnel decision in the former Claims Court under the Back Pay Act of 1966, 5 U.S.C. 5596(b)(1). *Fausto*, 484 U.S. at 455.

The courts of appeals have consistently applied *Fausto* to hold that the CSRA's remedial scheme precludes other avenues of relief for personnel actions relating to federal employees. For example, the courts of appeals have held that a federal employee may not seek judicial review of an adverse personnel action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, or

through a writ of mandamus. See, *e.g.*, *McAuliffe* v. *Rice*, 966 F.2d 979, 980-981 (5th Cir. 1992) (APA); *Stephens* v. *HHS*, 901 F.2d 1571, 1575-1576 (11th Cir.) (APA and mandamus), cert. denied, 498 U.S. 998 (1990); *Ryon* v. *O'Neill*, 894 F.2d 199, 200, 202-204 (6th Cir. 1990) (same). In addition, consistent with this Court's decision in *Bush* v. *Lucas*, 462 U.S. 367 (1983),[4] the courts of appeals have consistently refused to permit federal employees to file constitutional tort actions under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in cases arising from adverse personnel actions. See, *e.g.*, *Saul* v. *United States*, 928 F.2d 829, 838 (9th Cir. 1991) (citing cases); *Rollins* v. *Marsh*, 937 F.2d 134, 138-139 (5th Cir. 1991); *Lombardi* v. *Small Business Administration*, 889 F.2d 959, 960-962 (10th Cir. 1989).

Of specific pertinence here, the courts of appeals have also determined that federal employees who have been the subjects of adverse personnel actions may not obtain judicial review through damage actions under the FTCA. See, *e.g.*, *Morales* v. *Department of the Army*, 947 F.2d 766, 768-769 (5th Cir. 1991); *Rollins*, 937 F.2d at 139-140; *Rivera*, 924 F.2d at 951-952; see also, *e.g.*, *Premachandra*, 739 F.2d at 394 (pre-*Fausto* decision holding that the civil service laws "determined which consequential harms ought to be recompensed"); *American Postal Workers Union* v. *United States Postal Service*, 940

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[4] In *Lucas*, a federal employee brought an action alleging that an adverse personnel action had violated his First Amendment rights. This Court held that the "elaborate remedial system" of the civil service laws—which had been "constructed step by step, with careful attention to conflicting policy considerations"—should not be augmented by a judicial remedy for such a claim. 462 U.S. at 388.

F.2d 704, 708-709 (D.C. Cir. 1991) (Postal Reorganization Act, which incorporates elements of the CSRA, precludes FTCA claims). Petitioner has not cited, and we are unaware of, any court of appeals decision recognizing a cause of action under the FTCA in the context of an adverse federal personnel action.[5]

Petitioner argues (Pet. 19) that the CSRA deals only with the merits of personnel actions and does not preclude a court from supplementing its remedies through an FTCA action going to "collateral issues such as emotional distress." That argument, however, ignores the fact that the purpose of the CSRA "[is] to channel grievances and disputes arising out of government employment into a single system of administrative procedures and remedies, subject to judicial review." *Rollins*, 937 F.2d at 139 (quoting *Rivera*, 924 F.2d at 951). To permit a parallel system of judicial review of personnel actions through the FTCA "certainly would defeat that purpose." *Ibid.* The courts of appeals have consequently declined to allow federal employees to supplement relief obtained from the Merit Systems Protection Board (MSPB) with relief obtained under the FTCA. See *Rollins*, 937 F.2d at 135-136, 139-140 (CSRA precludes FTCA relief in addition to remedy of reinstatement and backpay awarded by MSPB); *Premachandra*, 739 F.2d at 393 (same).

[5] The Sixth Circuit has reserved the question whether the CSRA precludes an FTCA action by a federal employee for damages related to an adverse personnel action. *McDaniel* v. *United States*, 970 F.2d 194, 198 (1992) (per curiam). The Tenth Circuit has noted the possibility that a tort claim sufficiently distinct from an adverse personnel action may be brought under the FTCA. *Petrini* v. *Howard*, 918 F.2d 1482, 1485 (1990) (per curiam).

Petitioner further contends (Pet. 21-22) that a provision of the Whistleblower Protection Act of 1989 (WPA) allows him to bring his FTCA action. Specifically, he relies upon 5 U.S.C. 1222 (Supp. IV 1992), which provides that "nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23." But as the Ninth Circuit explained in *Rivera*, the "text of section 1222, standing alone, cannot support the * * * argument that the [WPA] has done more than preserve existing rights and remedies," and relief under the FTCA was not an "available" remedy when the WPA was enacted. 924 F.2d at 952. Moreover, the legislative history surrounding the enactment of the WPA confirms that result. *Id.* at 953-954.[6]

[6] As the court in *Rivera* explained, the Joint Explanatory Statement accompanying the WPA stated that "Section 1222 is not intended to create a cause of action where none otherwise exists or to reverse any court decision." 924 F.2d at 954 (quoting 135 Cong. Rec. 4514 (1989)). Moreover, Congress deleted a section of the House bill that provided that the WPA should not be construed to extinguish or diminish the rights or remedies available under certain other statutes, including the FTCA. 924 F.2d at 954; see H.R. Rep. No. 274, 100th Cong., 1st Sess. 13 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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